S.B.CIVIL SECOND APPEAL NO.406/2004.
(Lrs of Rajing Vs. Lrs of Partha)

Date of order : 29-01-2005.

HON'BLE MR.JUSTICE N.P.GUPTA.

Mr.N.K.Rastogi, for the appellants.

Heard learned counsel for the appellant.

It is contended by learned counsel for the appellant in the first instance that in the suit, plaintiff has not claimed any relief of declaration of easementary right.

I have read the plaint, and find that a specific prayer has been made in it. Thus this contention does not hold good. The next contention raised is that, the learned Lower Appellate court has not decided the issue no.1, and has decided appeal.

I have gone through the record, and find that appeal was filed before the learned lower Appellate Court, which was dismissed in default. Then it was restored and long thereafter prayer was made by both the parties that in the spirit of Lok Adalat, this court itself should inspect the site, and decide the matter, on the basis as to whether there was any alternate way or not. Obviously, meaning thereby that the controversy was limited to the question as to whether there is alternate way available to the plaintiff, other than the suit way or not? Not only this, thereafter the learned counsel for the appellant has moved another application before the learned lower Appellate Court under O.41 R.25 CPC for framing additional issue. That was framed and matter was sent to the trial court, who after recording the evidence of the parties, recorded its findings thereon.

It is, in these circumstances, that the learned lower Appellate Court has found on the basis of material on record including the inspection of site made by both the learned courts below, that there is no alternate way as suggested by the appellant. Thus the challenge to the finding on issue no.1 as recorded by learned trial court never survived, and a look at appeal filed in this court shows that it is not alleged that the appellant ever assailed the finding of learned trial court on issue no.1, which challenge was not considered by the learned lower Appellate Court.

Thus, I do not find any force in this appeal, and same is, therefore, dismissed

(N.P.GUPTA),J.

Srawat/-